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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1902.

No. 13

ROBERT R. WRIGHT, JR., AS MAYOR OF THE CITY OF DENVER, PLAINTIFF IN ERROR,

vs.

ELLEN TERESA MORGAN, ET AL., DEFENDANTS IN ERROR.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

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(No. 18519)

IN THE

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OCTOBER TERM, 1902.

No. 192.

ROBERT R. WRIGHT, JR., AS MAYOR OF THE CITY OF DENVER, PLAINTIFF IN ERROR,

vs.

ELLEN TERESA MORGAN, ET AL., DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This action was an action of ejectment brought in 1892 by plaintiff in error in the state court of Colorado to dispossess the defendants in error of twenty acres of land held by them against the claim of the mayor and the municipality that the lands were a part of a congressional grant to the mayor in trust, "to be

held and used for a burial place for said city and vicinity," and having been so acquired, granted, held and used for such public purpose was therefore absolutely inalienable. (Folio 2.)

The case was removed from the state District Court, on a petition of defendants in error, to the United States Circuit Court for the district of Colorado. (Folio 9.)

On May 21, 1872, the following act of Congress was approved and became a law of the United States:

> "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:
>
> "That the mayor of the city of Denver, in Colorado Territory, be, and he is hereby, authorized to enter through the proper land office, at the minimum price per acre, the following lands belonging to the United States, to wit: The northwest quarter of the southwest quarter of section number one, and the southwest quarter of the southeast quarter and the north half of the southeast quarter of section number two, in township number four, south of range number sixty-eight west of the sixth principal meridian, in the territory of Colorado, being one hundred and sixty acres of land lying adjacent to said city of Denver, to be held and used as a burial place for said city and vicinity. Approved May 21, 1872." (Volume 17. Statutes at Large, page 140.)

That thereafter, and in virtue of said special enactment of Congress, for the purposes therein named and not otherwise, the president of the United States signed and issued the following patent for 160 acres, embracing the twenty acres in controversy, to "Joseph E. Bates, mayor, in trust for the city of Denver, Colorado Territory":

"To all to whom these presents shall come, Greeting:

"Certificate No. 2044. Whereas Joseph E. Bates, mayor in trust for the city of Denver, C. T., has deposited in the General Land Office of the U. S. a certificate of the register of said office at Denver City, C. T., whereby it appears that full payment has been made by said Bates, mayor in trust, for the city of Denver, according to the provisions of the act of Congress of the 24th of April, 1820, entitled an act making further provisions for the sale of public lands for the N. W. ¼ S. W. ¼ Sec. 1; the S. W. ¼ N. E. ¼ and the N. ½ S. E. ¼ Sec. 2 tp. 4, S. R. 68 W., in the district of lands subject to sale at Denver City, C. T. containing 160 acres according to the official plat of the survey of the said lands returned to the Gen. Land Office by the surveyor general, which said tracts have been purchased by the said Bates mayor in trust for said city.

"Know ye that the U. S. A. in consideration of the premises and in conformity with the several acts of Congress in such case made and provided have given and granted

and by these presents do give and grant unto the said Bates, mayor in trust for said city and to his successors the said tracts above mentioned, to have and to hold the same together with all the rights, privileges, immunities and appurtenances of whatever nature thereunto belonging unto said Bates mayor in trust for the city of Denver, and to his successors and assigns forever, subject to any vested and accrued water rights for mining, agricultural or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local custom, laws and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted as provided by law.

"In testimony whereof, I, U. S. Grant, President U. S. A. have caused these letters to be made patent and the seal of the Gen. Land Office to be thereunto affixed. Given under my hand at the city of Washington, the 15th day of November, 1873, and of the Independence of the U. S. the 98th.

"By the President:

"(Seal U. S.) U. S. GRANT,

"by Z. B. STURGES, asst Sect.

"L. K. LIPPINCOTT

"Rec. Gen. L. Office."

Rec. Vol. 4, page 329.

Owing to an error of description in the enactment of May 21, 1872, Congress passed the following act amending the act of 1872:

"A Bill to Amend an act to Enable the city of Denver to purchase certain land for Cemetery purposes:

"Whereas, at the second session of the Forty-second Congress an act approved May twenty-first, eighteen hundred and seventy-two (seventeen statutes at large, page one hundred and forty) entitled an 'Act to Enable the City of Denver to Purchase Certain Lands in Colorado for a Cemetery' erroneously describes a tract of land as the northwest quarter of the southwest quarter of section one, and the north half of the southeast quarter of section two, and the southwest quarter of the southeast quarter of section two, township four south range sixty-eight west sixth principal meridian; and

"Whereas, The said City of Denver, has paid for and received a patent for the Northwest quarter of the southwest quarter of section one, and the north half of the southeast quarter of section two, township four south range sixty-eight west sixth principal meridian, which latter description is correct and in accordance with the land actually occupied by the said city of Denver for a cemetery; now, therefore,

"Be it enacted by the Senate and the House of Representatives of the United

States of America in Congress assembled, that an act entitled 'An act to enable the city of Denver to purchase certain lands in Colorado for a Cemetery' approved May twenty-first, eighteen hundred and seventy-two, be, and the same is hereby amended as follows: Strike out the words 'the southwest quarter of the southeast quarter' and insert in lieu thereof the words, 'the Southwest quarter of the northeast quarter' so that the description of the said land in the said act shall read:

"'The northwest quarter of the southwest quarter of section one, and the north half of the southeast quarter of section two, and the southwest quarter of the northeast quarter of section two, township four south, range sixty-eight west, of the sixth principal meridian.'

"Section 2. That the United States patent issued November fifteenth, eighteen hundred and seventy-three, conveying the northwest quarter of the southwest quarter of section one, and the southwest quarter of the northeast quarter of section two, and the north half of the southeast quarer of section two in township numbered four south of range sixty-eight west of the sixth principal meridian, in the Territory of Colorado, to Joseph E. Bates, mayor of the city of Denver, and to his successors and assigns forever, be, and the same is hereby approved and confirmed. That the said city of Denver be, and it is hereby, authorized to vacate the use

of the said land, or any portion thereof, as a cemetery, and to appropriate and use the same or any part thereof for a public park or grounds, and to no other purpose."

The land described in these acts and patent is about two miles distant from the present business center of the city. The grounds are elevated, sightly and overlook the city. These lands were used as a cemetery, by the people of the city of Denver and vicinity, as early as 1859, by Catholics, Hebrews and others, and ever thereafter to this day, and were in 1872 beyond the corporate limits of the city of Denver and far removed from the inhabited portion of the town.

These facts relating to the location of the grounds with reference to the city are not in the record, but they are well known to every citizen of Denver, and they will not be disputed.

The patent issued November 15, 1873, and was recorded in volume 4, page 329, of the records of the general land office, and recorded at Denver, in the county clerk and recorder's office on the 26th day of March, 1875.

On October 28, 1872, the Right Rev. Joseph P. Machebeuf, then bishop of the Catholic church for the diocese of Denver, filed and presented a petition to the mayor and common council of the city of Denver as follows:

"To the honorable the mayor and common council of the city of Denver:

"Your petitioner Joseph P. Machebeuf, Catholic bishop of Denver respectfully rep-

resents to your honorable body on his own behalf and on that of the Catholic church of Denver and Arapahoe County, that some time in the year 1863 he purchased for the sum of two hundred dollars from one John I. Walley, the following described piece of land situate in said county of Arapahoe, viz, the N. E. ¼ of the S. E. ¼ of sec. 2 T. 4. S. R. 68 W.; and that from the time of said purchase and since hitherto said piece of land has been used and still is used by the members of said Catholic church of Denver and Arapahoe County as a burial place, and that a great number of their dead are therein buried. And your petitioner further represents that having been informed that the city of Denver has procured from the Government of the U. S. a patent of a certain piece of land including the piece hereinbefore described to be used as a cemetery, he fears some measures may be taken by your honorable body to lay out and arrange the entire piece of land conveyed as aforesaid to the city of Denver, whereby the disposition and arrangement of said piece hereinbefore described might be greatly disturbed and (interefered) with to the detriment of the said members of the Catholic church in regard to the said land so used by them as a place of burial;

"Wherefore your petitioner humbly prays that your honorable body may instruct a good deed of conveyance to be made on the part of the said city of Denver by whomso-

ever is lawfully empowered in granting and conveying the fee of said piece of land hereinbefore described unto your petitioner as Catholic bishop aforesaid and to his successors in office forever, and your petitioner will ever pray, etc.

"JOSEPH P. MACHEBEUF,
"Bishop of Denver.
"By EDWARD L. JOHNSON,
"His Att'y-in-fact.

"Denver, Oct. 28, 1872."

(Folio 14.)

The petition of Bishop Machebeuf was referred to a special committee, which, on December 4, 1873, reported, recommending that the prayer of the petition be granted. (Folio 15.)

Thereafter, on January 8, 1872, the committee on public grounds and buildings made a like report upon the same petition, and thereafter the city of Denver, by Francis M. Case, its mayor, made its deed to the Right Rev. Joseph P. Machebeuf of the N. E. ¼ of S. E. ¼ of Sec. 2, T. 4 S., R. 68 west, being the land in controversy. (Folio 16.)

On the 25th day of April, 1887, Joseph P. Machebeuf made a conveyance of the south half of said land to Samuel B. Morgan, who platted and subdivided the same into lots and blocks as an addition to the city of Denver, and from whom the other defendants in error deraign their pretended title.

On September 1, 1892, Platt Rogers, as the mayor of the city of Denver, instituted this action in ejectment against the said Morgan and others for the pos-

session of the last above described tract of land. (Folio 2.)

To the complaint an answer was filed. By the answer the defendants admitted that the patent of the United States bearing date the 15th day of November, 1873, was issued by virtue of the act of Congress, approved May 21, 1872, but assert title under the proceedings of the common council of the city of Denver and the deed of date February 6, 1874, alleging a valuable consideration and payment of taxes for several years. (Folios 12-21.)

To the answer a demurrer was interposed, the principal ground of the demurrer being that the legal title, notwithstanding the deed to Machebeuf, and from Machebeuf to Morgan, was still in the mayor of the city of Denver in trust for the purposes enumerated in the acts of Congress and specifically set forth in the patent, and that the city of Denver or its mayor could not part with title to any part thereof. (Folio 23.) This demurrer was sustained. The cause was appealed to the Circuit Court of Appeals of the Eighth circuit, and that court, on March 1, 1897, reversed the judgment of the Circuit Court of the United States for the district of Colorado, to which judgment of the Circuit Court of Appeals error was prosecuted to this court, but the same was dismissed because, in the opinion of this court, the judgment of the Court of Appeals was not final.

The opinion of the Court of Appeals in reversing the judgment is to be found in volume 25 of the U. S. C. C. App. Repts., page 97; 79 Fed., 577.

Samuel B. Morgan, having died, the name of Teresa Morgan and other heirs were ordered substituted therefor. (Folio 37.)

Henry V. Johnson, having been elected mayor of the city of Denver, his name was ordered substituted for that of his predecessor in office, Platt Rogers (folio 25), and Robert R. Wright, Jr., having been elected mayor of the city of Denver, in April, 1901, his name was ordered substituted for that of his predecessor, Henry V. Johnson, as plaintiff in error. (Folio 62.)

On remittitur from the U. S. C. C. of Appeals the Circuit Court for the district of Colorado overruled the demurrer to the amended answer (folio 25), whereupon the plaintiff filed a replication and afterwards an amended replication. (Folios 26 to 28 and 29 to 30.)

The defendants filed a demurrer to the amended replication, which was overruled by the court. (Folios 31 and 32.)

The charter of the city of Denver, as it existed at the date of the passage of the act of authorization, on May 21, 1872, and on the date of the patent, November 15, 1873, contained the following provisions:

> "Section 4. The inhabitants of the said city, by the name and style aforesaid, through and by the city council, shall have power and authority to purchase, hold, possess and enjoy both real and personal property for a city hall, jail, public grounds and for other public purposes, and shall have power and authority to sell and convey the same; and may also, for the use of the inhabitants of the said city, purchase, hold, possess and enjoy real property beyond the limits of said city

for burying grounds and cemeteries and improve the same."

"Section 5. The inhabitants of said city, by the name and style aforesaid, shall have power and authority, and they are hereby empowered and authorized to take and hold, possess, use and enjoy both real and personal property by deed, grant, gift, bequest, devise or otherwise; and they shall have the power, through and by the city council, to sell and convey the same for the sole use and benefit of the inhabitants of said city."

Section 23, chapter 17, of the Revised Statutes of Colorado, 1868, being the chapter concerning conveyances, is as follows:

"The board of county commissioners of any county, or the common council of any city, may, by order to be entered of record among the proceedings of such board or council, appoint a commissioner to sell and convey any real estate belonging to such city or county and to affix to any conveyance thereof the seal of such city or county; and such conveyance executed in accordance with such order shall have the effect to transfer to the grantee named all the estate of such county or city in the real estate so conveyed."

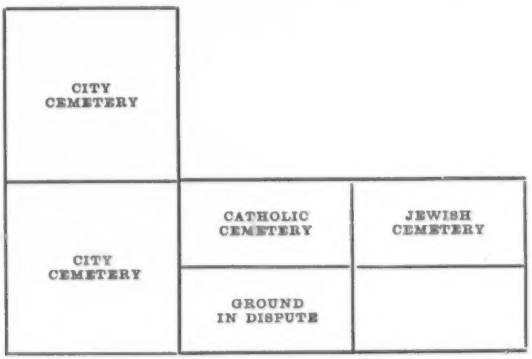
On November 28, 1899, the case was tried to a jury. The plaintiff introduced the patent of May 21, 1872, and rested. The defendants thereupon offered in evidence the deed of the city of Denver, by Francis

M. Case, mayor, to Joseph P. Machebeuf, being the deed set up *in haec verba* in defendant's answer. (Folio 16.) This deed was objected to on the grounds, 1st, that the city of Denver and its mayor were without power or authority, under the act of Congress of date May 21, 1872, to convey the lands which were acquired by virtue of said act; 2d, that no ordinance or resolution of the city council of the city of Denver had been shown authorizing the conveyance; 3d, that the deed does not conform to the recommendation of the committee to which the matter was sent and whose report was adopted. (Folio 39.) The court overruled the first and second objections upon the opinion in this case by the Circuit Court of Appeals (25 U. S. C. C. App. Rep., 97; 79 Fed., 577), and sustained the third ground of the objection and excluded the deed. (Folio 40.) Defendants then offered another deed from Bishop Machebeuf to Samuel B. Morgan, and from him to the several defendants herein, which were likewise rejected. (Folios 41 and 42.) The court then instructed the jury to return a verdict in favor of the plaintiff. (Folio 32.)

The defendants thereupon sued out a writ of error from the U. S. Circuit Court to the U. S. Circuit Court of Appeals. On the 24th of January, 1901, the judgment was reversed and the court below was directed to enter judgment in favor of the defendants, whereupon a writ of error was issued out of this court to the Circuit Court of Appeals and this case brought here for review.

The last opinion of the Circuit Court of Appeals is to be found in 106 Fed. Rep., 452.

We think a little plat showing the shape of the ground would be of assistance to the court, and we venture to give one in the form inserted in defendants in error's brief when the case was here before. By the patent the lands conveyed were the N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 1, and the N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of Sec. 2, and the S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of Sec. 2, Tp. 4 S., R. 68 W. The shape of the tract would be this:



SPECIFICATION OF ERRORS.

We contend that the Honorable Circuit Court of Appeals erred in holding that the words in the act of Congress of May 21, 1872, "to be held and used for a burial place for said city and vicinity," did not impress the land in controversy with a trust.

Second—That the court erred in holding that the government had parted with the absolute title to the land in controversy without impressing thereon any trust whatsoever by the act of Congress of May 21,

1872, and the patent issued in pursuance thereof, dated November 15, 1873.

Third—That the court erred in holding that the grant by patent, although in terms a trust, was a mere naked, passive trust, under which the entire beneficial use, possession and control vested at once absolutely in the city of Denver.

Fourth—That the court erred in holding that "although the use to which it was expected the land would be put is mentioned, it is rather as an explanation of the reason for permitting such unusual entry of the land by a municipal corporation than for any other purpose."

Fifth—That the court erred in holding that there are no words in the act of Congress restricting the use of the said land to cemetery or other purposes.

Sixth—The court erred in holding that the patent of date November 15, 1873, conveyed to, and vested the legal title to the land in controversy, in the city of Denver and not in Joseph E. Bates, the mayor of said city, and his successors, in trust.

Seventh—The court erred in holding that the city of Denver could make a valid and binding deed to the Rt. Rev. Joseph P. Machebeuf, bishop of Colorado, on February 6, 1874, or to any other person.

Eighth—The court erred in holding that the deed to the land in controversy made by the city of Denver, by Francis M. Case, mayor, was a valid deed, or that it conveyed any title whatsoever.

Ninth—The court erred in holding that the deed made to Joseph P. Machebeuf on February 6, 1874, conformed to the recommendations and report of the

Committee on Grounds and Buildings, as adopted on motion by the city council.

Tenth—That the court erred in holding that the proper officer of the city of Denver made and executed the deed of February 6, 1874, to Joseph Machebeuf.

ARGUMENT.

Our contention is that the land in controversy is absolutely inalienable under the terms of the act of May 21, 1872, and the patent of November 15, 1873, issued in pursuance of said act.

The act of 1872 and the patent should be construed together. There is but one purpose to be accomplished by all these proceedings leading up to and culminating in the issuance of the patent. The act contemplates the patent, and the patent is issued in virtue of the act. Together they disclose the intention of the government, and the two must be construed together.

We think it hardly necessary to cite authorities on this proposition, but we venture to cite the following generally supporting this rule of construction:

Johnson vs. Moore, 28 Mich., 3.

Torrence vs. Shedd, 112 Ill., 466.

Watson vs. Boylston, 5 Mass., 411.

Stuyvesant vs. Western Mtgs. & Inv. Co., 22 Colo., 28.

Clough vs. Bowman, 15 N. H., 504.

The various questions raised for review by this writ of error very largely solve themselves by the de-

termination of the intention and purpose of Congress by the act of 1872 and the construction to be given the patent issued by the government in pursuance of the act.

We think that the rules applicable to conditions precedent and subsequent, in ordinary conveyancing, between individuals, have no application here.

Board of Com. vs. Young, 59 Fed., 100.

Campbell vs. City of Kansas, 102 Mo., 326.

Here is the creation of an exclusive right by the sovereign power of the nation, conferred upon a single individual, in his official capacity, for the use and enjoyment of the members of a certain community, to enter, receive and hold land as a burial place. No one else has a like privilege. Why did Congress pass this act and confer this exclusive privilege in this particular instance? What moved Congress to so act? Was it to enable the mayor, or the municipality, to sell it for a bagatelle, subdivide it into lots and hawk them upon the market? We think not. The statute does not evince such a purpose. The act declares an express use for a different purpose. The title of the act, as well as the act itself, declare the purpose and intention of Congress. The granting clause of the act declares how the grant shall be held, viz., "to be held and used as a burial place for the said city and vicinity." This is the express purpose and intention of Congress,and the maxim *expressio unius est exclusio alterius* applies. Shall this plain, unambiguous language employed by Congress be so construed so as to give it effect, or shall it be so construed as to eliminate from the act the express and declared purpose of Con-

gress, and thus defeat the object for which it was "to be held and used?"

Furthermore, Congress did, in effect, make a gift and donation to Denver and "vicinity" in its effort to dedicate this public land, already being used for cemetery purposes. (Folio 14.) This land was within the territory of the Kansas Pacific R. R. land grant, and therefore held at the maximum price. The act of 1872, in permitting the mayor of the city of Denver to enter this land, authorized the entry to be made at the minimum price instead of the maximum, contrary to the general law, thereby giving one-half of the price of the land to the "said city and vicinity."

In the case of the Leavenworth R. R. vs. United States, 92 U. S., 633, Justice Davis, in speaking of an act of Congress granting land, says in construing the same:

> "It should neither be enlarged by ingenious reasoning, nor diminished by strained construction. The construction must be reasonable and such as will give effect to the intention of Congress. This is to be ascertained from the terms employed, the situation of the parties and the nature of the grant. If these terms are plain and unambiguous, there can be no difficulty in interpreting the act, but if they admit of different meanings—the one of extension and the other of limitation—they must be accepted in a sense most favorable to the grantor. And if a right be asserted against the government it must be so clearly defined that there can be no question of the

purpose of Congress to confer it. In other words, what is not given expressly or by necessary implication is withheld."

Justice Brewer, in Lake Superior Ship Canal Co. vs Cunningham, 155 U. S., 354-373, in delivering the opinion of the court, construing a land grant case, uses this language:

> "Further, the grant to the state of Michigan was to aid in the construction of a railroad. Affirmatively, it was declared in the act of Congress that the lands should be applied by the state to no other purpose. Even if there had been no such express declaration, such a limitation would be implied from the declaration of Congress that it was granted for the given purpose. As the state of Michigan had no power to appropriate these lands to any other purposes, certainly no act of any executive officer of the state could accomplish that which the state itself had no power to do."

The act of 1872, and the patent thereunder, granted the land in controversy to the mayor of the city of Denver in trust, "to be held and used as a burial place for said city and vicinity." We deny that the trust created by the act of Congress, and the patent to the mayor, was a mere naked, passive trust, as was assumed by the Honorable Court of Appeals. While the title of the act declares that it was to enable the city of Denver to purchase certain lands in Colorado for cemetery purposes, the granting clause con-

ferred a beneficial use, in the event of the purchase of said lands by the city, in the people in the "vicinity," as well as the inhabitants of the municipal corporation. The act declares it shall "be held and used as a burial place for said city and vicinity." Congress recites that the lands are "lying adjacent to the city of Denver," and evidently intended to confer, and did confer, equal privileges upon the people in the "vicinity" of the city of Denver as upon the people of the city itself. So that the title vested in the mayor in trust for the people outside of the city of Denver, as well as for the inhabitants of said city. The grant was not exclusively for the citizens of Denver. Furthermore, while the charter at the date of the act of 1872 provided that the city might hold land for cemetery purposes outside of the corporate limits, Congress well knew that the legislature might at any time take away the authority, hence an additional reason for granting the lands to the mayor in trust for said city and vicinity. If this is true, the trust was not a naked, passive one, which, under the statute of uses, passed to the municipality itself. The corporation could not take the title for the people outside of the city limits under the statute of uses, but the legal title remained in the mayor in trust for the purposes named in the act, viz., "for the said city and vicinity."

> "A grant to a municipal corporation for the purpose of establishing some charitable trust outside of the city limits for the benefit of the people having residence within the city, can not be sustained under the rule that

the municipal corporation can not serve as trustee in purely private trusts."

Tiedeman Mun. Corp., Sec. 204.
Dillon Mun. Corp. (4th Ed.), Sec. 565.

Therefore the Congress intelligently and wisely made the grant to the mayor in trust, instead of to the city of Denver, for the obvious reason that the corporation could not hold the trust estate for the benefit of the people living outside, and in the vicinity, of the city of Denver.

Therefore, the legal title being in the mayor in trust, the city of Denver could not, and did not, convey any title whatsoever by its deed to Bishop Machebeuf, dated February 6, 1874.

The reasoning of the Court of Appeals proves too much for defendant in error. It absolutely nullifies the act of the common council of the city of Denver in executing the deed to Bishop Machebeuf on the 6th day of February, 1874. If it is true that Joseph E. Bates, as mayor, took the title to said land free from any trust, except a passive one, then, in that view of the act of 1872 and the patent thereunder, the title conveyed did not pass from Bates, under the statute of uses (even if the Court of Appeals were right in saying it was not an active trust), to the city of Denver, for the reason that there was no power in the charter of the city of Denver to hold lands outside of the city limits for purposes other than a cemetery. If Joseph E. Bates, as mayor, received this land in trust, as private property for the city of Denver, the land being beyond the corporate limits, then the statute of uses could not so operate as to pass the title to the

municipal corporation in the absence of express authority in the charter to receive and hold the same. Therefore the title could not and did not pass, the Honorable Court of Appeals to the contrary notwithstanding, to the city of Denver, and Bishop Machebeuf took nothing by his deed of February 6, 1874.

But, even if we are in error in our position with respect to the operation of the statute of uses, and it should be held that the title to the lands did pass to the municipal corporation, still, and in that event, the municipal corporation would take the land as a public trust, for the exclusive use of the public, and not in its private and individual capacity. The lands being impressed with a trust by the act of Congress and the patent of the government, the title could no more be conveyed by the municipal corporation, than by the mayor as trustee. The lands being held for a public trust were inalienable for any purpose.

In Rosseau vs. City of Troy, 49 How. Pr., 492, one Vanderheyden, on the 20th day of May, 1796, conveyed to the then village of Troy a plat of land for the purpose of burial ground. There was an application for an injunction to restrain the city from using the ground to erect a city hall thereon. With reference to the title of the city the court uses the following language:

> "Holding the title to the premises, not as absolute owner, but simply and only for the purpose specified in the deed, it is not readily seen how the defendant could divest itself of the trust and appropriate the land to its own use for city purposes and erect

thereon a building required for the transaction of its municipal business. Had the property been conveyed to an individual, to be held for the same object, and he had accepted the trust, could he, in violation thereof, remove the bodies there reposing and proceed to erect a dwelling thereon for his own occupation? I see no difference between the two cases. The fact that the custodian of the title and the trustee to carry out the interest of the grant is a municipal corporation, does not impair the force of the argument, and one has no greater right to use the premises for his own purposes than the other."

And again:

"Neither do I question the power and right of the defendant to remove the dead when that is necessary for sanitary reasons, though from the length of time which has elapsed since burials have taken place therein (if the answer be true) it is difficult to see the existence of any such reasons, and they must exist to justify it. All this fails to meet the point, which is, that a trustee holding property for the purpose expressed in the grant can not, in violation of the trust, convert the premises so held to his, or its own use. Such a proposition, it seems to me, shocks the moral sense and can not be maintained."

In Stockton vs. Newark, 42 N. J. Eq., 531, 9 At. Rep., 203, the court say:

"If the title to the land was held by the township under the act of 1804 merely in trust for the purposes of the charity (use as a burial ground), the city holds it in like manner and upon the same trust. But it is urged by the answer that the city holds it irrespective of the act of 1804 as public property generally, without the impress of a trust or of devotion to any particular use upon it. This claim can not be sustained. How did the city get title except under the act of 1804? And what title has it except such title? Before that act the title was in the grantees, under the deed from the proprietors, or of the survivor or survivors of them, or their heir at law of the last survivor. If it be conceded that the Indian title was valid, the city has no title to the land under it. If the land was dedicated to the public use as a burying-ground by the old settlers, the power of the city over it, under such dedication, is only for the protection and regulation of the public use. It can not sell the land, nor release nor extinguish the use, for which the land was dedicated, nor employ it in any way variant from the purposes for which it was designed. Trustee vs. Hoboken, 33 N. J. Law, 13.

"Under the act of 1804, the title was vested in the township as a corporation to be appropriated and forever remain to and for the several use or uses expressed in the deed from the proprietors, and for no other use or uses whatever. The city, if it took the title

under the act and its charter, took it subject to that provision, and with a trust impressed upon it."

And the court further says:

"The object of burial is not to put the dead away temporarily, but to place them in a final resting place. When land is given in trust for a burial place, it obviously can by no means be said that the trust is at an end when the last body which can be buried in it has been deposited. The expectation in the burial of the dead is that they are to remain permanently, and the unauthorized disturbance of their remains is regarded with abhorrence as a desecration, and is criminal. A trust for a burying-place devotes the ground to the perpetual repose of the remains of the dead. It dedicates it to uses of the most sacred character. The burying-ground is God's acre."

In La Societa Italiana, etc., vs. City and County of San Francisco, 131 Cal., 169; 63 Pac., 174, the court say:

"That the city held said cemetery lands in trust for public uses, as a cemetery, can not be questioned, and it is equally clear that the plaintiff is a private corporation, and that a grant to its use is not a grant to a public use, even though the corporation uses it only for burial purposes." * * *

"It is sufficient to say in reply that the board of supervisors had no power to devote the land to any other than public uses, and the plaintiff was bound to know that they had no such power. The city and county can not be bound by the unauthorized acts of its agents."

In City of Columbus vs. Town of Columbus, 82 Wis., 374; 52 N. W., 425, the court say:

"The town holds the naked legal title to the cemetery grounds in trust for the inhabitants of the town and city exclusively for burial purposes. The town has no beneficial interest whatever in the property. It is powerless to convey it for any other than burial purposes. The town has no beneficial authority, or to appropriate to its own use any portion of the proceeds of sales of burial lots. * * *

"Because the town has no beneficial interest in the property, and because the use for which it holds the legal title thereto, in trust, is purely a public use, the fact that it holds the title is no impediment to the exercise by the legislature in its discretion of the power to change the trustee; saving to the inhabitants of the town and city all their beneficial interests and rights in the trust property."

In Board of Commissioners vs. Yound, 59 Fed., 97, the United States Circuit Court of Appeals for the Sixth circuit say:

> "Where land has been conveyed to a village for use as a public burying-ground, the village council, in their character as trustees, can not abandon the use, and thereby defeat the beneficial interest of the public."

Commonwealth vs. Rush, 14 Pa. St., 186, was a bill in equity upon the relation of the attorney general to restrain the erection of a dwelling house on a public square of the city of Allegheny. The court uses this language:

> "The act of assembly under which this town (now city) was laid out, is in the nature of a contract, and to be construed in the same manner as the contract of any proprietor of the town with the public, on their purchasing lots within the proposed town. He designates certain portions of his plan as lots for sale, other portions as streets or highways, for the use of the public, and again, other portions as public squares; he may designate the purpose for which they may be used, either as 'public squares' generally, or as situations for cemeteries, churches, markets, and the like, and for whatever purpose they are designated and appropriated, both the proprietor and the public, or lot holders, are bound by it. The proprietor can not withdraw the property from the public; his contract binds him, and it must remain; nor, on the other hand, can the public change the use or purpose for which it was originally designed, or at least not so long as there is a

single individual interested dissenting from the proposed alteration. They accepted the grant for the purposes named, and are bound to adhere to it." * * *

"The next question is, Have the city council a right to sell and convey this property to individuals for private purposes? * * * *

"The property is not theirs for sale. The use to which it is to be applied is but a debt—the private debt of the corporation; and it is violating the first principle of a trust when a trustee attempts to apply the trust property to his own use or to make money out of it. The city authorities therefore had no right to sell this property, and the title of the purchasers derived from them is wholly defective and can avail them nothing."

The case of Weekes vs. City of Galveston, 21 Texas Civil Appeals, 102; 51 S. W., 544, is a case where the city of Galveston leased Pelican Island and Flats, which constitute for several miles the northern boundary of Galveston harbor, and lie parallel with Galveston island, and are of great value for the preservation and improvement of the harbor and for increasing the maritime facilities of the port. In 1856 this island was beyond the limits of Galveston city, and was not available for municipal purposes. The court held the act of February 2, 1856, conveying the island to the city of Galveston, was in trust for the use and benefit of the public at large, and not merely for private uses, and hence the city had no power to

lease it for a long term of years to an individual for private purposes. The court say:

> "In construing the act of February 2, 1856, we should look beyond the words of the statute to ascertain the intent and purpose of the legislature. That municipal corporations may acquire and hold property for public as well as for corporate uses seems to be well settled, and, when a grant is for public purposes, duties are imposed upon the grantee which can neither be ignored nor their performance be delegated to others than the governing power of the corporation."

And to the same effect is the case of the City of Oakland vs. Oakland Water Front Company, 118 Cal., 160; 60 Pac., 277.

In the case of City of Visalia vs. Jacob, 65 Cal., 434; 4 Pac., 433, the court say:

> "After a street has been legally laid out and dedicated the municipal government retains or acquires a right of entry as agent of the public, clothed with the trust and duty of protecting and regulating the public use. The right of possession is held by the corporation for the benefit of the public and this right can not be conveyed to any private person. The lands so held are effectually withdrawn from commerce, while the street continues, as are those spoken of in Hoadly vs. San Francisco. As the municipality can not

convey the title, or relieve itself of the trust, private persons are virtually precluded from acquiring it."

The case of Clark vs. San Francisco, 124 U. S., 639, Vol. 31, Law. Co-op. Rep., 554, was a case where the city council of the city passed an ordinance which made it "the duty of the mayor to enter at the land office at the minimum price all the lands within the city above the natural high water mark of the bay of San Francisco 'in trust for the several uses, benefit, and behoof of the occupants or possessors thereof according to their respective interests.'" Thereafter Congress passed an act which "relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinance of said city," the land in controvery. This court, in construing said act of Congress, said:

> "In its legal effect the act of Congress conveyed the lands to the city for the uses and purposes specified in the ordinances and the order of the city ratified by the act of the legislature. In this way the two squares as designated in the report of the commissioners, approved by the order of October, 1856, were dedicated to public use as squares. Lands so dedicated could not lawfully be conveyed by the city to private parties."

To the same effect are:

San Francisco vs. Itsell, 80 Cal., 57.

Alton vs. Tr. Co., 12 Ill., star pages 38-60.

Augusta vs. Perkins, 3 B. Mon., 437.

Giltner vs. Carrollton, 7 B. Mon., 686.

Matthews vs. Alexandria, 68 Mo., 115.

Tiedeman, Mun. Corp., section 262, also section 202.

Story vs. R. R. Co., 90 N. Y., 124.

Warren vs. Mayor of Lyons, 22 Iowa, 315.

Brown vs. Manning, 6 Ohio Rep., 304.

North Yarmouth vs. Skillings, 45 Me., 133.

Dillon Mun. Corp. (4th Ed.), section 575.

The history of this land in controversy all tends to show that the property was specially dedicated by the act of Congress and by the city of Denver, with the approbation of Bishop Machebeuf and the public generally, to be used, and used only, as a public burial ground. The land, although public land, had been used for a burial ground for at least nine years prior to the act of 1872. (Folio 14, petition of Machebeuf.) Under these circumstances, with the dead of the Catholic church and others already buried there, Congress granted the land to the mayor of the city of Denver in trust, to be held and used as a burial place "for said city and vicinity." Bishop Machebeuf's petition (folio 14) to the city council of the city of Denver, dated but five months after the act of Congress of 1872, stated that the land had been procured from the government "to be used as a cemetery," and feared that some action might be taken by the city in the

laying out and arranging of the same, to the displeasure of the feelings and wishes of the members of the Catholic church, and therefore prayed for a deed to that portion of the land thus occupied by the members of the church as a burial place, which embraced the land in controversy herein. The city council acquiesced in the petition and granted the same, in effect setting it over to the Catholic denomination of Denver and vicinity as a place for the burial of their dead. It was already a burial ground, and was deeded to Bishop Machebeuf as and for a burial place. (Folio 14, petition of Machebeuf.) It was the evident intention of all parties that the land should be a cemetery. It had been used as a cemetery prior to the act of 1872 and long subsequent thereto.

The answer avers that the land in controversy was in the possession of Bishop Machebeuf in 1873, and from that time up to and until some time in 1887, and that said grounds were during all that time used as a burial place for the members of the Catholic church. (Folios 16 and 17.) This was a complete dedication of the land to the public use as a cemetery, and, therefore, the ground was not, nor any part of it, subject to alienation.

The charter of the city of Denver, as it existed in 1872, 1873 and 1874 provided as follows: "And may also for the use of the inhabitants of said city purchase, hold, possess and enjoy real property beyond the limits of said city for burying grounds and cemeteries and improve the same." It will be observed that the charter is silent on the subject of alienating grounds once acquired for cemetery purposes. Being public land in 1872, they were necessarily outside of the cor-

porate limits, and the city of Denver had no power to acquire or hold land outside of its boundaries, except for cemetery purposes. It having so acquired them, it had no power under the law of its organization to alienate them. The charter authorized the city to hold any such lands "for the use of the inhabitants of said city," and, while the city was without authority in its charter to sell or convey lands thus held, it was equally without authority under the general principles of law to alienate land thus acquired for a charitable or public use.

This court in City of Cincinnati vs. White, 6 Peters, 431, book 8, L. Co-op. Rep., 452, said:

> "There is no particular form or ceremony necessary in the dedication of land to the public use. All that is required is the assent of the owner of the land, and the fact of its being used for public purposes intended by the appropriation."

To the same effect see:

Davidson vs. Reed, 111 Ill., 167.

Redwood Cemetery vs. Bandy, 93 Ind., 246.

Colbert vs. Shepard, 89 Va., 401.

In the case of Hunter vs. Turstee, 6 Hill (N. Y.), 407, the court say:

> "Dedication, as the term is used in reference to this subject, is the act of devoting or giving property for some proper object, and

in such manner as to conclude the owner. The law which governs such cases is anomalous. Under it, rights are parted with and acquired in modes and by means unusual and peculiar. Ordinarily some conveyance or written instrument is required to transmit a right to real property; but the law applicable to dedications is different. A dedication may be made without writing; by act in pais, as well as by deed." * * *

"No certain period of time is required to prove a dedication of property to public use. It does not depend upon the lapse of time, but upon the intention and the acts of the parties. Twenty years' adverse holding may bar a right of entry, and upon it a grant may be presumed. But time, although cogent evidence of dedication, is not a necessary ingredient in it. It may be established by acts, unequivocal in their character, on the part of the owner and the public, although occurring on a single day."

In people vs. Holladay, . . . California . . . ; 5 Pac., 798, the court said:

"If the property in dispute was dedicated in 1858 to public use, of course the act of Congress of 1864 did not destroy or in any respect impair such dedication; but on the contrary, as said here in Hoadley vs. San Francisco, 50 Cal., 274, 'by granting and relinquishing the title of the United States to the city for the uses and purposes mentioned

in the act of March 11, 1858,' it ratified and confirmed the dedication and made it operative upon the legal title, as well as such title as the city held prior to the act of July 1, 1864, and thus virtually perfected the dedication."

"Staking off ground as a cemetery and allowing burials therein amounts to a dedication."

Hagaman vs. Dittmar, 24 Kan., 42.
Hayes vs. Houke, 45 Kan., 466.

If the legal title did pass to the city of Denver, as held by the Honorable Court of Appeals, then the land was held by the corporation for a purely public purpose, and not in its private or individual capacity. If it was held for a public purpose, it was inalienable and not subject to the payment of the debts of the city.

Merriweather vs. Garrett, 102 U. S., 472.

If, on the other hand, it was held for private use, as distinguished from public and governmental purposes, it would in that case be alienable and consequently liable for the debts of the corporation, and subject to levy and execution sale. Will it be contended here that the land in controversy, after having so long been used as a cemetery and granted by the government as a burial place, could be levied upon and sold to satisfy the debts of the corporation? This, it seems, is the inevitable result of the holding of the Honorable Court of Appeals.

"The property of a municipal corporation which is essentially public in its nature,

and is held in trust for the public by the corporation, and is necessary for the proper exercise of its municipal functions, can not be sold to satisfy the debts of the corporation.

"But the private property of a municipality, held for purposes of income or sale, unconnected with any governmental use or function, may be levied on and sold to satisfy a judgment rendered against the municipal corporation."

20 Am. and Eng. Enc. of Law (2d Ed.), page 1190.

New Orleans vs. Louisiana Constr. Co., 140 U. S., 654.

Birmingham vs. Rumsey, 64 Ala., 353.

Curry vs. Savannah, 64 Ga., 290.

Darlington vs. N. Y., 31 N. Y., 164.

Wellington vs. Wellington, 46 Kan., 213.

For these reasons we believe that the judgment of the Honorable Court of Appeals should be reversed.

Respectfully submitted,

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